Supreme Court, U. S.
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No. 96-111

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CENTRAL CARTAGE CO.,
Petitioner,
v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS C. NYHAN *
General Counsel
ALBERT M. MADDEN
THOMAS M. WEITHERS
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction under 28 U.S.C. § 1292(a)(1) to review an interlocutory order that denied a motion to compel exhaustion of contractual alternate dispute resolution procedures.

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 29.6, Respondents state that none of Respondents are corporations.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case was brought under § 515 of ERISA (29 U.S.C. § 1145) by the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter collectively referred to as "Central States") to collect fringe benefit contributions owed by Central Cartage Co. ("Cartage") for 1992 and 1993 on behalf of casual (i.e. "short term") employees and regular employees in accordance with a collective bargaining agreement and the

Central States' trust agreements. The case was filed a short time after the conclusion of district court litigation between the same parties concerning Cartage's liability for contributions owed from 1987 to 1991. In the course of awarding summary judgment to Central States in the prior litigation, the court rejected Cartage's contention that it was not required to contribute on casual employees who had not joined the union or on regular employees for days compensated but not worked (e.g. paid holidays). *Central States Pension Fund v. Central Cartage Co.*, 861 F. Supp. 1402, 1411 (N.D. Ill. 1994), *aff'd.*, 69 F.3d 1312 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996) (hereinafter "*Cartage I*".) The final judgment required Cartage to pay contributions of $1.7 million on casual employees and $200,000 on regular employees. 861 F. Supp. at 1411. Before entry of the summary judgment in *Cartage I*, the union (not Central States) attempted to invoke the same alternative dispute resolution procedures of the collective bargaining agreement (hereinafter referred to as "ADR") relied upon by Cartage in this case to resolve the casual employee issue. However, Cartage objected contending that the dispute should be resolved in federal court in *Cartage I* and after a nearly 2-year delay, the union's grievance was formally declared to be deadlocked (Res. App. 1a-7a).

This case was filed to collect $870,000 in contributions on casual employees and $267,000.00 on regular employees which an audit revealed to be owed for the period immediately after that covered by *Cartage I*. At the time Cartage was served, its request that the district court in *Cartage I* reconsider its summary judgment award with respect to the casual employee issue was pending and the court had not yet ruled on the regular employee issue. Six months later, the district court in *Cartage I* rejected the request for reconsideration and also ruled against Cartage on the regular employee issue. Cartage then realized that issue preclusion principles would foreclose its argument that the contributions sought by Central

States in this case were not due and it could prevail only if it could steer the case to a forum that was not bound by the doctrine. As a result, Cartage filed its motion to compel ADR contending that Central States' claim was subject to same ADR procedures that it had previously resisted.

The district court indicated that the case was "governed by the Seventh Circuit's decision in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc*," 50 F.3d 388 (7th Cir. 1995), which established that to avoid a waiver of ADR, a party was "obligated [to] promptly . . . seek a stay or dismissal." (Pet. App. 3a). Since Cartage waited nearly a year before filing its motion during which it "participated in this lawsuit, conducted discovery and filed two written status reports", the district court concluded that ADR had been waived and that it was not necessary to address the other five reasons identified by Central States for denying Cartage's motion (Pet. App. 3a).

The court of appeals dismissed Cartage's appeal for lack of jurisdiction. The court of appeals recognized that the decision in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-8 (1988) indicated that 28 U.S.C. § 1292(a)(1) authorized appellate jurisdiction over not just orders that granted or denied injunctions but also orders that had the practical effect of granting or denying injunctions as long as the order also had "serious, perhaps irreparable, consequence." (Pet. App. 13a). There was no claim that the district court order was an injunction so the court of appeals had to determine whether the order had the practical effect of denial of an injunction and had serious or irreparable consequences. The court of appeals concluded that the first requirement was not satisfied because the order was merely procedural and did not have the practical effect of the denial of an injunction (Pet. App. 13a-15a) The second requirement was not satisfied because prior seventh circuit authority indicated an erroneous refusal to order a stay pending

arbitration did not cause irreparable harm since it only imposed additional litigation costs which never constituted irreparable injury and in any event, the mistake could be corrected by an appeal from a final decision. (Pet. App. 15a). Further, the court noted that irreparable harm could not result in this particular case because "Cartage's own actions in delaying nearly a full year before filing its motion to compel arbitration tends to demonstrate that prompt arbitration was not of vital interest to Central Cartage." (Pet. App. 15a n.1).

REASONS FOR DENYING THE WRIT

The writ should be denied for four reasons. First, this court has repeatedly indicated that review of interlocutory decisions is rare and Cartage has not identified any exceptional circumstances that warrant immediate review in this case. Second, the cases relied upon by Cartage in support of its claim that a conflict among the circuits exists are distinguishable because: a) they involved parties that (unlike Cartage) timely requested arbitration and thus were able to convince an appellate court that they would be irreparably harmed if an immediate appeal was not allowed because the benefits of speed and economy derived from arbitration would be lost forever if their appeal was not heard until entry of final judgment and b) they did not involve an ADR procedure that had already deadlocked over the dispute between the parties, and c) they did not involve labor law ADR which cannot resolve statutory claims such as Central States' claim in this case. Third, certiorari should be denied because the issue of appellate jurisdiction over orders which deny a stay in favor of arbitration was addressed by Congress with the 1988 amendments to the Federal Arbitration Act ("FAA") and the cases relied upon by Cartage in support of the claimed conflict between the circuits did not consider the impact of the amendment. As a result of the amendment, the issue in this case is not sufficiently important to warrant review because it will arise only in

very rare circumstances where the FAA is inapplicable. Fourth, even if the seventh circuit was wrong on the jurisdictional issue, it is exceedingly unlikely that Cartage will prevail on the merits since the district court's waiver determination will be reviewed under an abuse of discretion standard and the court of appeals has already indicated that Cartage's delay was unreasonable. Since Cartage will lose on the merits in any event, the writ should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE UNDERLYING ORDER IS INTERLOCUTORY.

Ordinarily, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893). Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id., see also, Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (certiorari denied "because Court of Appeal's remand made case not yet ripe for review by this Court"); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (J. Scalia concurring in denial of writ of certiorari because "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Judge Stevens' dissenting, referring to "the Court's normal practice of denying interlocutory review.") Piecemeal appellate review is disfavored in order to conserve scarce

judicial resources and avoid delay and cost to the parties. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 n.7 (1988). Further, a party that is dissatisfied with an interlocutory order may prevail on the merits ultimately making review by this Court unnecessary.

Certainly, nothing in the petition suggests that this case is extraordinarily important to anyone other than the litigants. In fact, as noted below (part III, *infra*), the issue is not at all important since the 1988 amendment of the FAA explicitly authorizes appellate review of a court order denying arbitration so this situation will arise, if at all, only in the very rare case that is not covered by the FAA. 9 U.S.C. § 16.

Since the decision below is interlocutory and involves a situation that rarely occurs, the petition for writ of certiorari should be denied.

II. THE CASES RELIED UPON BY CARTAGE ARE DISTINGUISHABLE.

Cartage claims that its petition should be granted because the court of appeals decision conflicts with the decisions of other circuits. However, even if the purported conflict existed, the cases relied upon by Cartage are distinguishable for three reasons.

First, Cartage could not satisfy the irreparable harm factor required by the cases it cites because its nearly one year delay in seeking ADR led the court of appeals to believe that ADR "was not of vital importance to Central Cartage." (Pet. App. 15a n.1). In each case cited by Cartage, the courts recognized that an order that had the practical effect of the denial of an injunction was appealable under *Gulfstream Aerospace Corp.* only if the denial also resulted in serious, perhaps irreparable consequences. Each court believed the denial of arbitration has such effect because the benefits of arbitration—speed and econ-

omy—would be lost if the movant was forced to trial before being able to appeal. Cartage's one year delay in seeking ADR is fatal to appellate jurisdiction because it demonstrates that these benefits of ADR are irrelevant to Cartage. Cartage further demonstrated its aversion to ADR when it objected to the union's efforts to invoke ADR and contended that the dispute over casual employee contributions had to be resolved in the federal forum selected by Central States (Res. App. 2a-4a). The only difference now is that issue preclusion principals dictate that Cartage will lose in this forum because of the decision in *Cartage I*. Certainly, the desire to avoid the preclusive effect of a federal court judgment is not the type of serious or irreparable consequence contemplated by the cases relied upon by Cartage. Since Cartage has demonstrated that it does not place the value on ADR that was so critical in the cases it cites, the cases are readily distinguishable.

Second, the cases relied upon by Cartage are also distinguishable because the grievance panel that would hear the dispute has already deadlocked on the casual employee issue after a nearly 2-year delay (Res. App. 5a-7a). Since the deadlocked grievance panel was the final stage in the ADR procedure (Res. App. 13a), ADR is incapable of resolving this dispute so the purported benefits of speed and economy relied upon in the cases cited by Cartage do not exist here.[1]

Finally, the cases cited by Cartage are distinguishable because this case involves ADR under a collective bargaining agreement which, unlike arbitration under the FAA, cannot vindicate statutory rights. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 774-5 (1981); *McDonald v. City of West Branch*, 466 U.S.

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[1] Cartage argued below that the grievance panel deadlocked on an issue of which forum was proper, not on the merits. Even if this were so, there is no reason to believe the panel will not again deadlock on the forum issue.

284 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20 (1991). Cartage's main argument on the merits is that although the collective bargaining agreements explicitly require contributions on all casual employees, the parties really only agreed that contributions would be paid on casuals who were union members. *Cartage I*, 69 F.3d at 1313-14. While § 515 of ERISA forecloses this oral understanding defense in the federal forum, *Cartage I*, 69 F.3d at 1315, the defense would be available to Cartage at ADR because the grievance panel cannot enforce Central States' ERISA rights. In contrast, the cases relied upon by Cartage all involve arbitration under the FAA so statutory rights could be vindicated.

Further, the ADR procedure under the collective bargaining agreement is not "arbitration" as Cartage claims because disputes are submitted to grievance panels consisting solely of union and employer representatives and usually will not reach an independent arbitrator. Requiring a multiemployer fund to exhaust such a procedure is inconsistent with ERISA. *Central States Pension Fund v. Tank Transport, Inc.*, 779 F. Supp. 947, 951 (N.D. Ill. 1991) Since ADR is *per se* inadequate in this case, the district court's refusal to order ADR could not have the serious or irreparable consequences required by the cases cited by Cartage

III. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED RARELY ARISES.

Certiorari should be granted only if the conflict between the circuits claimed by Cartage relates to an "important matter." SUP. CT. R.10. However, the purported conflict claimed by Cartage is not important because "Congress eliminated the significance of this issue [of appellate jurisdiction] for most purposes by adding a new section to the Federal Arbitration Act." *Briggs & Stratton v. Local 232 International Union*, 36 F.3d 712, 714 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1998 (1995). In its

petition, Cartage does not challenge the court of appeals' determination that its collective bargaining agreement is not covered by the FAA so Cartage must rely exclusively upon 28 U.S.C. § 1292(a)(1). But ADR clauses not covered by the FAA are rare so the alleged conflict between the circuits is of limited application and no important issue justifying certiorari is presented.

Eight months after *Gulfstream Aerospace Corp.*, Congress amended the Federal Arbitration Act ("FAA") by adding § 16 which explicitly authorizes immediate review of orders which deny arbitration so in the vast majority of cases where a district court refuses to require arbitration, there is a clear right to appellate review. 9 U.S.C. § 16. Not surprisingly, there have been virtually no cases dealing with whether there is appellate jurisdiction to review the denial of arbitration under 28 U.S.C. § 1292(a)(1) since 1989. One leading commentator has explained the reason for this situation as follows:

> *Gulfstream* came down on March 22, 1988. In just a few months, with the adoption of § 15 of Title 9 as part of the Judicial Improvements Act on November 29, 1988, Congress was to make *Gulfstream*, and the case law that it overruled, largely academic on the arbitration scene. With § 15 and its more explicit directions, Congress superseded § 1292 (a)(1) of Title 28 in respect of the arbitration injunctions, abandoning altogether the law/equity distinction and substituting a pro-arbitration/anti-arbitration distinction in its place. . . In this locale, § 15 has the full-time job and § 1292(a)(1) is now unemployed.

David D. Siegel, *Appeals from Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 597 (1989).[2]

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[2] Professor Siegel refers to § 15 of Title 9 in his article. In 1990, § 15 was renumbered as § 16, Pub. L. 101-650, Title III § 325(a)(1) Dec. 1, 1990.

Each of the fourth circuit decisions relied upon by Cartage were decided or submitted before the November 19, 1988 FAA amendment. *Peoples Security Life Ins. v. Monumental Life Ins.*, 867 F.2d 809 (4th Cir. 1989) (submitted October 4, 1988); *J.J. Ryan & Sons v. Rhone Poulenc Textile S.A.*, 863 F.2d 315 (4th Cir. 1988) (submitted June 2, 1988); *Kansas Gas & Electric Co. v. Westinghouse Elec. Co.*, 861 F.2d 420 (4th Cir. 1988) (submitted October 5, 1988). A short time later, the fourth circuit recognized that the FAA amendment "dispelled doubts about our jurisdiction", *Jeske v. Brooks*, 875 F.2d 71, 73 (4th Cir. 1989), and it has never again relied upon 28 U.S.C. § 1292(a)(1) for appellate jurisdiction.

Concededly, the Eighth Circuit decided *Nordin v. Nutri/System, Inc.*, 897 F.2d 339 (8th Cir. 1990) after the FAA amendment. Apparently, the appellant failed to argue that appellate jurisdiction was automatic under the FAA, which unquestionably governed the case since the FAA was mentioned in the discussion on the merits. 897 F.2d at 343-44. Eventually the Eighth Circuit recognized that jurisdiction existed under the FAA in *Case Int'l Co. v. T.L. James and Co.*, 907 F.2d 65, 66 n.1 (8th Cir. 1990) and each of the subsequent eighth circuit decisions have relied upon the FAA as the basis for jurisdiction over orders that reject arbitration without ever mentioning § 1292(a)(1). *In re: Piper Funds, Inc., Institutional Government Income Portfolio Litigation*, 71 F.3d 298, 300 (8th Cir. 1995); *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694 (8th Cir. 1994).[6]

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[6] Respondent is aware of only one case decided after the FAA amendment that discussed jurisdiction under 28 U.S.C. § 1292(a)(1) which was not cited by petitioner. *Briggs & Stratton Corp. v. Local 232 Industrial Union of Allied Industrial Workers*, 36 F.3d 712 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1998 (1995). The *Briggs & Stratton* court eventually decided appellate jurisdiction did lie under the FAA.

Since Cartage concedes that the discussion in *Abernathy v. Southern California Edison*, 885 F.2d 525 (9th Cir. 1989) is *dicta* at best (actually the court explicitly indicated it was not "offer[ing] an opinion on the issue"), the decision does not support Cartage's claim that a conflict exists. Further, *Zosky v. Boyer*, 856 F.2d 554 (3rd Cir. 1988) is inopposite because it involved an appeal from an order that stayed a proceeding in favor of arbitration. Moreover, subsequent to these decisions the third and ninth circuits have determined that appellate jurisdiction over orders refusing to stay a case in favor of arbitration are appealable under the FAA so the issue is not important in either circuit. *Saari v. Smith Barney & Co.*, 968 F.2d 877, 879 (9th Cir. 1992); *Hays & Co. v. Merrill, Lynch, Inc.*, 885 F.2d 1149, 1151-52 (3rd Cir. 1989).

Since the issue identified by Cartage is of limited application, the petition should be denied.

IV. RESOLUTION OF THE QUESTION PRESENTED WILL NOT AFFECT THE ULTIMATE DEPOSITION OF THIS CASE.

Even if this Court were to grant the writ, it would not affect the ultimate outcome of the case. It is well established that:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). The district court ruled that Cartage had waived ADR because the alleged right was belatedly asserted. Cartage concedes that this determination must be reviewed under the deferential abuse of discretion

standard. It is exceedingly unlikely that Cartage could prevail under this standard of review, especially since the Seventh Circuit has already stated that Cartage's delay "tends to demonstrate that prompt arbitration was not of vital interest to Central Cartage." (Pet. App. 15a n.1). Since Cartage's ADR defense will be rejected on the merits, the petition should be denied.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for writ of certiorari be denied.

THOMAS C. NYHAN *
General Counsel
ALBERT M. MADDEN
THOMAS M. WEITHERS
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800
Attorneys for Respondents

* Counsel of Record